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No. _____

# In the Supreme Court of the United States

1-800-FLOWERS.COM, INCORPORATED,
FRESH INTELLECTUAL PROPERTIES, INCORPORATED,
AND 800-FLOWERS, INCORPORATED,
*Petitioners*,

v.

CURTIS P. JAHN AND
CAPITOL WAREHOUSING CORPORATION,
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The respondents entered into a contract purporting to sell a toll-free telephone number in exchange for a perpetual royalty on the use of that number. The FCC – which had long prohibited attempts to establish any ownership interest in toll-free telephone numbers – later promulgated a formal rule expressly forbidding the sale of a toll-free telephone number for profit.

1. Is express congressional authorization required for an FCC rule to bar the payment of *future* royalties for the sale of a toll-free telephone number?

2. May a federal court enforce a private contract that violates express public policy?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Seventh Circuit were plaintiffs-appellants Curtis P. Jahn and Capital Warehousing Corp., and defendants-appellees 1-800-Flowers.com, Inc., Fresh Intellectual Properties, Inc., and 800-Flowers, Inc.

Petitioner 1-800-Flowers.com, Inc. is the parent company of petitioners Fresh Intellectual Properties, Inc., and 800-Flowers, Inc. 1-800-Flowers.com, Inc. is publicly held and owns more than 10% of the stock of both Fresh Intellectual Properties, Inc., and 800-Flowers, Inc.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . iv

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

REGULATION . . . . . 1

STATEMENT OF THE CASE . . . . . 3

REASONS FOR GRANTING THE WRIT . . . . . 6

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS. . . . . 6

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION ON RETROACTIVITY . . . . . 9

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS FORBIDDING FEDERAL COURTS FROM ENFORCING CONTRACTS THAT VIOLATE PUBLIC POLICY . . . . . 10

CONCLUSION . . . . . 14

## TABLE OF AUTHORITIES

### CASES

*Bergerco Canada v. United States Treasury Department*, 129 F.3d 189 (D.C. Cir. 1997) . . . 8

*Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) . . . . . *passim*

*DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997) . . . . . 8

*FCC Letter to Joseph J. Weiss*, 13 F.C.C.R. 4122 (1977) . . . . . 5, 12

*FDIC v. Faulkner*, 991 F.2d 262 (5th Cir. 1993) . . . . . 7

*Hurd v. Hodge*, 334 U.S. 24 (1948) . . . . . 10, 11, 13

*Independent Petroleum Association of America v. DeWitt*, 279 F.3d 1036 (D.C. Cir. 2002) . . . . . 8

*Landgraf v. USI Film Products*, 511 U.S. 244 (1994) . . . . . 6, 9

*Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911) . . . . . 10, 11, 12, 13

*National Medical Enterprises, Inc. v. Sullivan*, 957 F.2d 664 (9th Cir. 1992) . . . . . 7, 8

*Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935) . . . . . 10, 11, 13

*Patients Plus, Inc. v. Long Distance Telecommunications Service, Inc.*, 13 F.C.C.R. 5827 (1997) . . . . . 5

*U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000) . . . . . 7, 8

*W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) . . . . . 10, 11

**STATUTES AND REGULATIONS**

28 U.S.C. § 1254 . . . . . 1

47 C.F.R. § 52.107 . . . . . *passim*

**MISCELLANEOUS**

John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Cal. L. Rev. 12 (1967) . . . . 7

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The Seventh Circuit's opinion and Judge Flaum's concurrence are reported at 284 F.3d 807 (7th Cir. 2002), and reprinted at App. 3a. The contrary opinion and order of Judge Crabb for the United States District Court for the Western District of Wisconsin is unreported and reprinted at App. 12a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 22, 2002. App. 3a. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing *en banc* on April 23, 2002. App. 1a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## REGULATION INVOLVED

47 C.F.R. § 52.107: **Hoarding**.

> (a) As used in this section, hoarding is the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. **The definition of hoarding also includes number brokering, which is the selling of a toll free number by a private entity for a fee.**

(1) Toll free subscribers shall not hoard toll free numbers.

(2) No person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee.

(3) Routing multiple toll free numbers to a single toll free subscriber will create a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers.

(b) *Tariff Provision.* The following provision shall be included in the Service Management System tariff and in the local exchange carriers' toll free database access tariffs:

> [T]he Federal Communications Commission ("FCC") has concluded that hoarding, defined as the acquisition of more toll free numbers than one intends to use for the provision of toll free service, as well as **the sale of a toll free number by a private entity for a fee, is contrary to the public interest** in the conservation of the scarce toll free number resource and contrary to the FCC's responsibility to promote the orderly use and allocation of toll free numbers.

(Emphasis added.)

## STATEMENT OF THE CASE

This case concerns the secondary retroactivity of an FCC rule and tariff forbidding the sale of toll-free telephone numbers for a fee, and the power of federal courts to enforce future payments under a private contract that violates the FCC's express public policy by requiring ongoing payments for the sale of a toll-free telephone number.

The toll-free telephone number that spells "1-800-FLOWERS" was randomly assigned in 1976 to Madison Truck Brokers, a company owned and operated by respondent Curtis Jahn. App. 14a. Jahn later founded another company, respondent Capital Warehousing Corporation, and transferred the FLOWERS number to it. *Id.* Capital Warehousing (wholly owned by Jahn) continued to use the number in the operation of its warehouse and trucking business until 1982. Id.

In 1982, Jahn and Capital Warehousing (collectively "Jahn") agreed to sell the FLOWERS number in exchange for a perpetual royalty on flower sales made over that number. App 27a. The agreement, which was amended in 1986, allowed the purchaser to assign the FLOWERS number, but provided that any assignee was required to assume the perpetual royalty obligation. App. 18a. Jahn has received over $1 million for the sale of the number under the agreement. App. 22a.

Nonetheless, Jahn wants more. Jahn brought suit in the Western District of Wisconsin to enforce the contract against the number's current subscriber, petitioner 800-FLOWERS, Inc. and related companies, claiming entitlement to even greater royalties for the sale of the FLOWERS number. App. 12a. Petitioners sought summary judgment on

the ground (*inter alia*) that the contract was unenforceable because the FCC prohibited the selling of a toll-free number for a fee. App. 13a.

Judge Crabb held that Jahn had sold a toll-free number for a fee, and that the contract would be illegal if entered into after the FCC promulgated a 1997 rule expressly prohibiting such sales. App. 27a. She found that the law before 1997 was not as clear, although she did note that prior law and FCC policy prohibited subscribers from claiming or establishing any "proprietary interest" in toll-free numbers, App. 21a, and that the FCC had ruled that "attempting to negotiate the transfer of a toll-free number for profit" was contrary to its longstanding policy. App. 23a. Still, Judge Crabb found it unnecessary to address whether Jahn's contract was legal when made or whether the 1997 rule applied retroactively, for petitioners did not seek disgorgement of the $1 million Jahn had already received. App. 27a, 30a. Instead, Judge Crabb focused on the fact that the *ongoing* payment "violates Federal Communications Commission policy and 47 C.F.R. § 52.107(a)'s prohibition against selling toll-free numbers for a fee." App. 27a. Because the ongoing, future payments were against the public policy codified in 47 C.F.R. § 52.107, Judge Crabb refused to enforce the contract under Texas law, granting summary judgment to petitioners. App. 30a.

The Seventh Circuit reversed. In the principal opinion, Judge Easterbrook assumed that a contract for the sale of a toll-free number would be illegal if entered into today. App. 5a. In a concurring opinion, Judge Flaum concluded that it would be. App. 11a. The court accepted Judge Crabb's uncontested finding that Jahn's contract was for the sale of a toll-free telephone number, App. 5a, yet reversed, focusing on the two questions Judge Crabb found

unnecessary to reach: whether the contract was legal when made and whether the rule could be applied retroactively. App. 8a-9a.

First, the Seventh Circuit looked at whether the amended agreement for the sale of the number was valid when it was entered in 1986. According to the FCC, attempting to profit from the transfer of a toll-free number is contrary not just to the 1997 rule, but "to the longstanding Commission policy prohibiting the establishment of ownership interests in toll free numbers." App. 23a (quoting *FCC Letter to Joseph J. Weiss*, 13 F.C.C.R. 4122 (1997)). That policy was expressed in tariffs filed with the Commission in the early eighties, which specifically provided that subscribers had no "interest or proprietary right" in any given toll-free telephone number. App. 21a. The FCC concluded that because subscribers had no proprietary interest in toll-free numbers, they were prohibited from selling such telephone numbers even before 1997. *See* App. 24a (quoting *Patients Plus, Inc. v. Long Distance Telecommunications Service, Inc.*, 13 F.C.C.R. 5827 (1997)).

The Seventh Circuit dismissed this argument as "untenable." App. 8a. Looking to leaseholds and internet domain names as analogies, the court concluded that the FCC's explicit prohibition on attempts to establish ownership interests in toll-free numbers did not in any way restrict subscribers from selling toll-free numbers before 1997. App. 8a-9a.

Having determined that the contract was valid when made, the court then considered whether the subsequent 1997 rule could apply to the ongoing payments required by the contract. App. 9a. Citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the court ruled that because

Congress had not authorized the FCC to adopt regulations with retroactive effect, the FCC rule could not be applied retroactively to affect the 1986 contract – or even the continuing obligation to pay *future* royalty payments under the contract. App. 8a-9a. Making no distinction between primary and secondary retroactivity, the Seventh Circuit determined that applying the rule to bar future payments would have a retroactive effect. *Id.* Indeed, it ruled that "[c]hanging today's financial consequences of an earlier transaction is the paradigm of retroactivity" requiring express congressional authorization. App. 9a.

## REASONS FOR GRANTING THE WRIT

This case presents important questions regarding the scope of the presumption against retroactivity and the power of federal courts to enforce private contracts that violate public policy.

### I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

Absent congressional authorization, regulations are presumed to have no "retroactive" effects. *Georgetown*, 488 U.S. at 500. The decision below broadens the scope of the presumption against retroactivity to include what Justice Scalia has referred to as "secondary retroactivity." *See Georgetown*, 488 U.S. at 219 (Scalia, J., concurring); *see Landgraf v. USI Film Prods*, 511 U.S. 244, 293 n.3 (1994) (Scalia, J., concurring) (no violation of presumption against retroactivity where law alters future legal effect of past transactions). Primary retroactivity occurs when a rule "alters the legal consequences of past events *as of the time of those events*"; secondary retroactivity, on the other hand, arises

when a rule merely changes the future consequences of past events as of the time the rule is enacted. John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 Cal. L. Rev. 12, 58-59 (1967) (emphasis in original) (cited in *Georgetown*, 488 U.S. at 219 (Scalia, J., concurring)). Affecting a past transaction without congressional authorization is permissible; changing the past law is not. *Georgetown*, 488 U.S. at 220 (Scalia, J. concurring).

Under Judge Easterbrook's opinion, however, a rule that changes "today's financial consequences of an earlier transaction" has a retroactive effect that is impermissible absent express congressional authorization. App. 9a. This is directly contrary to circuits that hold that changing the future financial consequences of a past transaction is *not* the type of retroactivity requiring congressional authorization. *See, e.g., U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 233 (D.C. Cir. 2000) (rule with secondary retroactivity valid so long as reasonable); *Nat'l Med. Enters., Inc. v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992) (rule limiting the rate of return on a past investment is secondarily retroactive and subject only to a reasonableness test). The D.C. and Ninth Circuits have adopted Justice Scalia's reasoning, noting the distinction between primary and secondary retroactivity and concluding that only laws with primary retroactivity trigger the presumption that retroactive rules requires express congressional authorization. *See U.S. AirWaves*, 232 F.3d at 233; *Nat'l Med. Enters., Inc.*, 957 F.2d at 671. *See also FDIC v. Faulkner*, 991 F.2d 262, 266 (5th Cir. 1993) (noting distinction, but finding no need to apply it).

The distinction is important. As Justice Scalia has recognized, rules with secondary retroactivity are well within an agency's rulemaking authority – without any need for congressional authorization. *Georgetown*, 488 U.S. at 219-

220 (Scalia, J., concurring). A rule establishing new rates for Medicare reimbursement, for example, may be applied to payors who have entered long-term contracts negotiated in reliance on the old rates, so long as the rule is applied only to payments for future services. *Id.* at 220. Similarly, a rule that limits the future return allowed on an investment may be applied to investments made before the rule was promulgated, because changing the future consequences of a past transaction is "an entirely lawful consequence of much agency rulemaking." *Nat'l Med. Enters.*, 957 F.2d at 671.

The other circuits addressing the issue have thus all upheld rules with secondary retroactivity without express congressional authorization. *See, e.g., U.S. AirWaves,* 232 F.3d at 233 (rule with secondary retroactivity valid so long as reasonable); *Nat'l Med. Enters.*, 957 F.2d at 671 (upholding application of a regulation that "undeniably affected the *future* legal consequences of past transactions," but did not alter "the past legal consequences of past actions"). Indeed, the D.C. Circuit has repeatedly held that agency rules with such "secondary retroactivity" need only meet the reasonableness test required by the arbitrary and capricious standard of the Administrative Procedure Act. *See Independent Petroleum Ass'n of Am. v. DeWitt,* 279 F.3d 1036, 1039 (D.C. Cir. 2002) (applying reasonableness test to rule with secondary retroactivity); *U.S. AirWaves,* 232 F.3d at 233 (a secondarily retroactive rule "is valid only to the extent that it is reasonable"); *Bergerco Can. v. United States Treasury Dep't,* 129 F.3d 189, 192-93 (D.C. Cir. 1997) (explaining analysis); *DIRECTV, Inc. v. FCC,* 110 F.3d 816, 825-26 (D.C. Cir. 1997) (applying reasonableness test). This is a far cry from the Seventh Circuit's requirement of express congressional authorization.

There is no logical way to reconcile the split of authority created by the Seventh Circuit's decision below. A rule with merely secondary retroactivity will be subject to a much stricter standard in the Seventh Circuit than in the rest of the nation, making the validity and application of many regulations turn on which court hears the case.

## II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION ON RETROACTIVITY.

In *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), this Court instructed lower courts to determine if a law is "truly" or "genuinely" retroactive by looking at whether it creates new legal consequences for "events ***completed*** before its enactment." *Id.* at 270, 277, 279 (emphasis added). *See also id.* at 293 n.3 (Scalia, J., concurring) (explaining why the presumption against retroactivity is not violated by a law that alters the future effect of past transactions). The decision below, however, fails to distinguish between ongoing and completed events.

Judge Easterbrook's failure to appreciate the importance of this distinction is apparent in his conclusion that the parties' transaction was "no different, as an economic matter," than if petitioners had been paid a lump sum instead of an on-going royalty. App. 10a. First, as an economic matter, there is a significant difference between the two: providing for future royalty payments shifts to the seller the risk of various possible future events (not only changes in the law, but bankruptcy of the buyer, development of new technology, or other events that would make the 800 number more or less valuable). A rational negotiation of a lump-sum payment would have produced an amount lower than the

present value of the future royalty stream because it would have relieved the seller (respondents) of these risks.

Second, the *legal* difference between a lump-sum transaction and a royalty arrangement is critical. If respondents had been paid a lump sum before 1997, their transaction would have been completed before the rule's promulgation, and the law would have left the parties where it found them. But the arrangement here was *not* completed before the 1997 rule took effect. Because respondents chose future royalties over a lump sum, they must invoke the affirmative aid of the law in compelling a continuation of contractual performance that concededly violates current law.

## III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS FORBIDDING FEDERAL COURTS FROM ENFORCING CONTRACTS THAT VIOLATE PUBLIC POLICY.

This Court has long held that federal courts may not enforce contracts that violate law or public policy, even if the contracts were valid when made. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307, 308, 311 (1935); *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467, 485 (1911). The reason is simple: enforcing a contract that violates public policy frustrates that policy, regardless of whether the contract was made before or after the adoption of the policy. *Norman*, 294 U.S. at 309-10 (holding gold clauses in pre-existing private contracts unenforceable after passage of congressional resolution declaring such clauses to be against public policy).

The issue, then, is not the validity of contract, but the power of the courts:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

*Hurd*, 334 U.S. at 34-35. Thus, public policy can deprive a court of authority to enforce a private contract, even where the contract itself is perfectly legal. *Id.* (holding it violated public policy to use the power of the federal courts to enforce a private agreement not to sell a house to blacks, even where the private agreement was not itself illegal). Where the contract actually violates some public policy – even policies adopted after the contract was made – the courts lack the power to enforce it because enforcement would then itself violate public policy. *See W.R. Grace*, 461 U.S. at 766 (noting that if a contract "violates some explicit public policy, we are obliged to refrain from enforcing it"); *Norman*, 294 U.S. at 309-310.

Accordingly, this Court held in *Louisville & Nashville R.R. v. Mottley* that a contract is unenforceable, even though valid when made, if it would be illegal to enter into such a contract at the time enforcement is sought. *Mottley*, 219 U.S. at 485. In *Mottley*, a railroad company promised an injured railroad passenger free annual passes for life in exchange for a release of all claims against the railroad company arising

from the passenger's injuries. *Mottley*, 219 U.S. at 471-72. Some 30 years later, Congress enacted a statute making it illegal to give free annual passes. *Id.* at 472. The railroad company refused to continue to give the injured passenger free annual passes, and the passenger sued to enforce the contract. *Id.* This Court ruled that since the contract for free annual passes "would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made." *Id.* at 485.

Here, Jahn was promised ongoing royalties on the sale of flowers over the telephone number 1-800-FLOWERS in exchange for the sale of the number. App. 5a. Some 15 years later, the FCC promulgated a regulation making it illegal to pay a fee for the sale of a toll-free telephone number. 47 C.F.R. § 52.107; App. 5a. Jahn sued to enforce the contract, and the district court ruled that since the contract would have been illegal if entered after promulgation of the FCC's rule, it could not be enforced against petitioners, even if it was valid when made. App. 27a, 30a.

Enforcing the contract would require the court to exercise its power to compel payment for the sale of a toll-free telephone number. Public policy, however, expressly prohibits the establishment of any ownership interests in toll-free numbers, and compelling payment for the sale of a number establishes ownership interests in that number. *See FCC Letter to Joseph J. Weiss*, 13 F.C.C.R. 4122 (1997) (explaining that attempts "to negotiate the transfer of a toll free number for profit were contrary to the longstanding Commission policy prohibiting the establishment of ownership interests in toll free numbers").

Indeed, the FCC has made it clear that any attempt to profit from the sale of even a *single* toll-free number is contrary to public policy. *Id.*; 47 C.F.R. § 52.107(b) ("[T]he sale of a toll free number by a private entity for a fee, is contrary to the public interest ... and to the FCC's responsibility to promote the orderly use and allocation of toll free numbers."). Jahn's contract requires perpetual payments for the sale of a toll-free telephone number; enforcing that contract is just as contrary to public policy as the attempt to profit from the sale. *See id.*; App. 27a, 30a. Under this Court's decisions, the district court had an obligation to decline to enforce the contract. *Hurd*, 334 U.S. at 34-35; *see* App. 30a.

The Seventh Circuit, however, reversed the district court and directed further proceedings on Jahn's claim for enforcement of the contract. App. 11a. By reversing the summary judgment and allowing Jahn's claim to proceed, the Seventh Circuit completely departed from this Court's decisions in *Hurd, Mottley,* and *Norman*, without explaining or even acknowledging its departure. Certiorari should be granted to affirm the continuing validity of this Court's decisions.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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